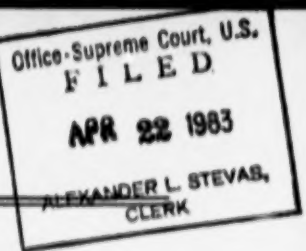


No. 82-1311



**IN THE
SUPREME COURT
OF THE UNITED STATES**

OCTOBER TERM, 1982

**JEWELL PRODUCTIONS, INC.,
aka EROS; JAMES L. SCOTT,**

Petitioner,

vs.

**PEOPLE OF THE STATE OF
CALIFORNIA,**

Respondent.

**BRIEF OF RESPONDENT IN
OPPOSITION TO GRANTING OF
WRIT OF CERTIORARI**

IRA REINER

**City Attorney of Los Angeles
CHERYL J. WARD, Chief Assistant
Criminal Branch**

DONNA B. WEISZ

**Deputy City Attorney
Room 1600 City Hall East
200 North Main Street
Los Angeles, California 90012
(213) 485-6357**

Attorneys for Respondent

QUESTION PRESENTED

Whether petitioner's conviction for violating California Penal Code §311.5 (advertising for sale matter held out to be obscene) was obtained in violation of the First and Fourteenth Amendments of the United States Constitution where said statute was construed and applied to permit such conviction in the absence of:

a) proof that the matter so advertised was actually obscene; and

b) proof that each and every item of matter advertised in said advertisement was promoted and held out to be obscene.

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TO THE HONORABLE CHIEF JUSTICE
AND ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

The Respondent, People of the State
of California, respectfully pray that a
Writ of Certiorari to review the
judgment of the Appellate Department of
the Superior Court of the State of
California, entered against Petitioner

in the above-entitled case on November 22, 1982, not issue.

OPINIONS BELOW

No written opinions were rendered by the Municipal Court of the Los Angeles Judicial District. The defendants demurrer was orally overruled on August 22, 1980. The jury's verdict of guilty was affirmed by a written decision of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles on November 22, 1982. This opinion appears in Appendix A of Petitioners' Writ. The Order Denying Rehearing and Denying Certification and Publication was issued by the Appellate Department on December 9, 1982 and appears in Appendix D of Petitioners' Writ.

JURISDICTION

The judgment of the Appellate Department of the Superior Court for the County of Los Angeles was entered November 22, 1982. A copy of the judgment appears in Appendix A of Petitioners' Writ. A timely Petition for Rehearing or, in the alternative Certification of the cause to the Court of Appeal was denied by the said Appellate Department on December 9, 1982. A copy of said order appears in Appendix B of Petitioners' Writ.

As a result of the prior proceedings, the Appellate Department of the Superior Court of The State of California for the County of Los Angeles became the highest court of the State in which a decision could be had. See, California Penal Code §1471; California

Rules of Court, Rules 24(a) and 28(b);
Smith v. California (1959) 361 U.S. 147,
148, fn. 2, 4 L.Ed.2d 1498, 77 S.Ct.
1103; Virginia Ry. Co. v. Mullins (1925)
271 U.S. 220, 222.

CONSTITUTIONAL AND
STATUTORY PROVISIONS
INVOLVED

California Penal Code §311.5
provides in pertinent part as follows:

"Every person who. . ., in any
manner promotes, the sale,
distribution, or exhibition of
matter represented or held out by
him to be obscene, is guilty of a
misdemeanor."

The First Amendment provides, in
part, as follows:

"Congress shall make no law
. . . abridging the freedom of

speech, or of the press. . . ."

The Fourteenth Amendment provides, in part, as follows:

" . . . No state shall . . .
deprive any person of life,
liberty, or property, without due
process of law. . . ."

STATEMENT OF THE CASE

On April 7, 1980, Los Angeles police Detective Robert Peters assigned to the Administrative Vice Division received in the mail an unsolicited advertising brochure from "Eros Discount" depicting sex acts between animals and human adults, for example "Big Horse and Girl", and between human adults and children, for example "Preteen Baby Movies" and "Baby and Dad Sex". Through surveillance, Detective Peters traced the brochure to

petitioners Jewell Productions Inc. and James L. Scott.

On April 21, 1980, Detective Peters went to a Judge of the Municipal Court of the Los Angeles Judicial District to secure a search warrant. Detective Peters prepared an 11 page affidavit in support of a search warrant which he submitted to the Honorable Clarence E. Stromwall, Judge of the Municipal Court of the Los Angeles Judicial District. After reviewing the affidavit, Judge Stromwall issued a search warrant. The warrant was served and a search was conducted under the supervision of Detective Peters.

During the search, none of the materials advertised in the brochure were found.

On May 22, 1980, the City Attorney

of the City of Los Angeles filed a complaint against Jewell Productions, Incorporated, aka EROS, and James L. Scott charging them with having committed a violation of Penal Code §311.5 (advertising matter represented or held out to be obscene). A copy of the complaint is included as Appendix E in Petitioners' Writ.

On July 31, 1980, Defendants filed a demurrer to the complaint (attached as Appendix F to Petitioners' Writ) and noticed a motion to traverse the Search Warrant and a motion for suppression of the evidence (P.C. §1538.5).

On August 22, 1980, after both sides had submitted written points and authorities and argument was heard, the Honorable Michael Berg, Judge Presiding, overruled the demurrer and denied the

motions to traverse the Search Warrant and the motion for suppression of the evidence.

Defendants, through counsel, were arraigned and plead not guilty. A trial date of October 16, 1980 was set. After several continuances, a jury trial commenced on January 12, 1982 in Division 26 of the Los Angeles Municipal Court, the Honorable James S. Yip, Judge presiding.

On January 18, 1982, the court ruled, in limine, that the actual content of the material advertised was irrelevant to the charge. The trial court also instructed the jury, in effect, that it was not necessary that it agree that each and every item advertised was held out to be obscene (also advertized were dildos, blow-up

dolls, and a variety of other sexually oriented merchandise), so long as all jurors agreed, if they so found, on what matter they found to have been held out to be obscene.

Plaintiffs were found guilty. The court placed them on probation and imposed a fine.

ARGUMENT

NO SUBSTANTIAL FEDERAL

QUESTION IS PRESENTED

In the two and one half decades since Roth v. United States (1957) 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1103, this Court has decided numerous obscenity cases; nothing in the Petition for Certiorari indicates that another is necessary.

Petitioner's brief raises mundane issues about trial court evidentiary

rulings, yet, because the work "obscenity" is involved, their knee-jerk reaction is to invoke the whole panoply of 1st and 14th Amendment rights.

Their contentions are two: the trial court erred in instructing that the advertising brochure need not be considered "as a whole", and it ruled that the actual content of the matter advertised was not germane to the question of whether they advertised it to be obscene.

Petitioner's arguments ignore the fact that their brochure was a catalog -- in addition to the films they advertised, which Respondents alleged were held out to be obscene, the brochure advertised sexual applicances, "rubber goods", comic books, still pictures, etc. The "taken as a whole"

portion of the obscenity test is necessary to a determination of the obscene nature of the matter, but it is irrelevant to a decision whether someone has held out matter, whether obscene or not, to be obscene. Similarly, whether the matter so held out is actually obscene is irrelevant to the question of whether matter has been held out as obscene.

In this case, Petitioners advertised to sell films depicting bestiality ("Animals for Sex films, Reg. 8mm or Super 8mm B & W, four complete films of bestiality at its best: 1. Beast Suck-Off, 2. Large Cock Dog, 3. Big Horse and Girl, and 4. The Stud and I") and sex with children ("Preteen Baby Movies. Four Complete Films of Preteen Sex! These films are the hardest films

to purchase for the obvious reasons! They show little boys and girls getting it on!! Naturally, we can't show a picture of what these kids are doing on this brochure. Reg. 8mm or Super 8mm B & W 1. Baby and Dad Sex; 2. Let's Play With It; 3. Teen Suck Off, and 4. First Time I Came"). Their manner of advertising constituted pandering.

"The deliberate representation of Petitioner's publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content... .Where the purveyor's sole emphasis is on the sexually provocative aspects of his

publications, that fact may be decisive in the determination of obscenity".

Ginsberg v. United States

(1965) 383 U.S. 463, 470, 16

L.Ed.2d 31, 38, 86 S.Ct. 942.

Petitioners clearly commercially exploited the erotica advertised solely for the sake of its prurient appeal.

Penal Code §311.5 as construed and applied in this case is clearly consistent with Federal Law. Grimm v. United States (1894) 156 U.S. 604, 15 S.Ct. 470, 39 L.Ed. 550 and its progeny show that the "federal question" Petitioners attempt to raise was settled by the federal courts years ago.

United States Revised Statute §3893 prohibited the use of the mails for transmitting information regarding the

place where obscene, lewd or lascivious pictures could be obtained. The court in Grimm, supra, upheld the statute's validity despite the fact that the letter in question was not in itself obscene, lewd or lascivious and the pictures, papers and prints were merely alleged to be obscene,

United States v. Hornick (3rd Cir. 1956) 229 F.2d 120 upheld Title 18 U.S.C. §1461 (mailing advertisements giving information as to where obscene pictures could be obtained) and followed Grimm v. United States, supra, in holding that the announcement itself is not required on its face to promise obscene material if that is its purpose. The court further held:

"We do not think it is
necessary that representations

made in these advertisements be true. The statute says "advertisement * * * giving information." The statute does not say that the advertisement must be true or that the information must be accurate. What is forbidden is advertising this kind of stuff by means of the United States mails. We think that the offense of using the mails to give information for obtaining obscene matter is committed even though what is sent in response to the advertisement to the gullible purchasers is as innocent as a Currier and Ives print or a Turner landscape."

United States v. Hornick,
supra, at 122

In United States v. Perkins (6th Cir. 1961) 268 Fed. 2d 150, 151, following the precedent established in Grimm, supra, and Hornick, supra, the court held that the actual obscenity of the material advertised was irrelevant.

California has clearly followed federal law.

The California Court of Appeal in Kirby v. Municipal Court, (1965) 237 Cal.App.2d 335, 349 (Petition for hearing by the California Supreme Court denied, November 24, 1965), relied on Grimm v. United States, supra, when it held that "the validity of statutes like §311.5 is not a new question, nor should its answer be in doubt".

The Kirby court also held:

"Clearly, advertising of matter which is found or conceded to be obscene is not within the protective area of free speech or press (established by Alberts v. United States, supra, 354 U.S. 476); such advertising is equally as subversive of good morals as is the sale of the article thus held out for sale, and the decisions in Grimm v. United States, supra, 156 U.S. 604; United States v. Hornick, supra, 229 F.2d 120 specifically hold that an advertisement fitting into the description of our \$311.5 - "represented or held out to be obscene" - is equally beyond

the protection of free speech as is a sale of the subject literature regardless of whether that literature is itself barred from sale because pornographic".

(Kirby v. Municipal Court,
supra, p. 348)

The California Courts have also specifically dealt with one of the issues raised by Petitioners in People v. Tierney (1967) 253 Cal.App.2d 1. Despite the fact that all of the materials advertised were, according to the court, described as "innocuous", the court reversed the trial court's dismissal of an indictment against the defendants for conspiracy to violate §311.5 based on their mailing of a brochure offering for sale films, still

photographs, playing cards, and comic books. The Court found that:

"All of the respondents knew of the contents of their brochure, since all participated in its preparation or distribution, or both. It offers, or at the very least appears to offer, material of an obscene nature. Its preparation was carefully devised, and its calculated purpose was to lead the reader to believe that some perverted or sexual material would be supplied to those who placed their orders and sent in their money. But as we have said, the material supplied was innocuous."

Id. at 4-5

There is no significant difference between Kirby, supra, Tierney, supra, and Petitioners' case. The trial court here followed precedent established by the United States Supreme Court, the Federal courts and the courts of the State of California. Petitioners concede that laws making it illegal to distribute obscene material are constitutional. Laws which prohibit advertising matter to be obscene do not operate to infringe upon either the First or Fourteenth Amendments.

CONCLUSION

For the foregoing reasons respondents submit that the arguments raised in the Petition for Writ of

Certiorari in this matter are simply not meritorious. The Petition should be denied.

Dated: April 19, 1983.

Respectfully submitted,

IRA REINER, Los Angeles
City Attorney
CHERYL J. WARD, Chief Assistant
Criminal Branch
DONNA B. WEISZ
Deputy City Attorney

By DONNA B. WEISZ
Deputy City Attorney

Attorneys for Respondents